—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

October Term, 1904.

NO. 226.

JOHN T. NEW,
Plaintiff in Error,

vs.

THE TERRITORY OF OKLAHOMA,
Defendant in Error.

Brief and Argument of Defendant in Error.

STATEMENT OF FACTS.

The plaintiff in error, John T. New, was tried on the charge of murder in the District Court of Washita county, Oklahoma Territory, and convicted. He was sentenced to imprisonment at hard labor for life. From the judgment of the tri-

al court he prosecuted an appeal to the Supreme Court of Oklahoma, where the case was heard on error, and the judgment of the District Court was affirmed. From this judgment of the Supreme Court of Oklahoma Territory, he comes on error to this court.

The plaintiff in error, John T. New, and the deceased, H. F. Doyle, were both residents of Washita county, Oklahoma. They were residing on farms, their lands being adjacent to each other and their respective dwelling houses were about one mile apart. (See diagram attached to transcript record, marked "Exhibit A.") New and Doyle had married sisters. On the 13th of April, 1901, Doyle and his brother-in-law, Walter A. Reaves, were returning from a trip they had made to the town of Granite, about twenty miles distant. The trouble occurred in the evening, about an hour and a half before sunset. Doyle and Reaves were traveling in a wagon, sitting on chairs, and Doyle was driving, holding a line in each hand. They were driving a pair of loose horses belonging to Reaves in front of their team and were traveling east along the public road that led to the home of Doyle and were about half a mile from it when the trouble occurred. Before reaching Doyle's home they had to cross a public road running north and south which intersected the road on which they were traveling. On the north side of the road they were traveling and east of the north and south road was John New's pasture. As they approached this pasture they saw John New at the corner, ap-

parently engaged in working at the wire or gate. The defendant claims that he had taken his winchester rifle and gone down by a ravine a short time prior to this to look for some ducks, but failed to find any and seeing a steer out in the road that he believed to be his, came down to the gate, drove him in and was engaged in fixing the wire at the time he saw Doyle and Reaves coming down the road.

The evidence is to the effect that New looked up and saw them coming but pretended to go on with his work and waited until they were within about sixty yards of him when he started to walk down the fence line, picked up his winchester rifle, threw it up to his shoulder quickly and fired at Doyle. Doyle jumped out of the wagon on the south side, leaving the wagon between him and New. Reaves seeing New throw the shell out of his rifle, jumped out on the same side with Doyle. New shot again, the bullet going between Doyle and Reaves, at which Reaves started to run and went a little west and then took the road south. Doyle's team became frightened and broke away from him, ran a short distance and fell down, one of the horses being killed by one of the shots from New's rifle, which passed through its body. Doyle started to run down the road east to the house of G. E. Trotter, a neighbor, New firing at him as he ran. Several shots missed him and then New rested his rifle on a post, took deliberate aim at Doyle and shot him, the ball passing through his thigh. Doyle threw his hand to his leg where he was shot, sank down,

but got up and went on running toward Trotter's house. As Doyle neared the house he saw Trotter standing near the house and cried out to him "Do not let him kill me" and Trotter, seeing New coming, went out to try and stop him. He intercepted New and caught him, but New jerked loose, from him, saying, "God damn you, turn me loose," and rushed on toward the house. In the meantime, Doyle had reached the house. Mrs. Trotter had come out and he said "For God's sake, don't let him kill me." She told him she would do all she could to keep him from it, and he said he wanted to go in the house. She opened the door for him and he went in. She shut the door and went to the outside again, saw New coming and caught hold of him and asked him not to go in. He kept on going into the house, pulling her along, and she said "For God's sake, don't kill him in my house." He said "If you will turn me loose, I won't," and took hold of the door knob and went in. He pushed on into the room where Doyle had taken refuge and found him sitting on the floor behind the door. New then deliberately shot Doyle as he was sitting there helpless, the ball going in at the left cheek and coming out in the side of the neck and down into the shoulder, a mortal wound, and then after shooting him, used his gun as a club and crushed in his skull. New then went out and procured a horse and made his escape to Greer couty where he was arrested a week later by the sheriff of Washita county. An inquest was held over the body of Doyle by a Justice

of the Peace who testified that he found a revolver on the body of Doyle in his inside vest pocket and that it was fastened in with a safety pin and that it was difficult to remove the revolver as it seemed to be cankered and would not slip easily. Other details of the evidence will be considered further on in the brief and the testimony of the defendant will be given in full.

ARGUMENT.

The first assignment of error by plaintiff in error is that the trial court erred in refusing to give the following instruction requested by defendant, below to the jury:

"You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased, that is, if you are in doubt as to whether or not he died from the effects of gun shot wounds or from the effects of injuries inflicted by a blow upon the head by some deadly instrument, then it is your duty to acquit the defendant."

This instruction was evidently presented by the defendant below upon the theory that there was a fatal variance between the allegations of the indictment and the proof in support thereof in the description of the instrument used and character of the wound inflicted which resulted in the death of Doyle.

I hardly think this proposition entitled to the serious consideration of this court. The allega-

tion in the indictment as to the character of the weapon and injury received by Doyle, is as follows:

"Then and there with a certain Winchester rifle loaded with gun powder and divers leaden bullets, shoot a bullet into the body of him, the said H. F. Doyle, and so inflicted and so made a mortal wound upon and in the body of the said H. F. Doyle, of which mortal wound, so inflicted and so made in the manner and form and with the purpose aforesaid, the said H. F. Doyle, on said 13th day of April, 1901, and in said Washita county aforesaid, did die, etc." (See printed record, page 17.)

The defendant evidently proceeds upon the theory that because the evidence showed that New inflicted upon the body of Doyle two wounds, both of which were necessarily fatal, and only one of which was described in the indictment, that thereby there is a variance between the allegation and the proof. There is nothing in this contention. They evidently argue the question upon the theory that the testimony of Dr. McLain (printed record 49, 50, 51) was the only evidence offered upon the question as to what caused the death of the deceased. The doctor examined the body of Doyle after his death and found both fatal wounds, being the shot which went entirely through Doyle's face and neck and embodied itself in his shoulder, and the crushing in of the skull by a blow struck on the head with a rifle in the hands of New. While it is true that this witness stated that he could not tell whether death was caused from the gun shot wound or from the blow on top of the head, it does not fol-

low that the jury could not have found from other evidence what caused the death of the deceased. Either of the two wounds was fatal. The gun shot wound was such that it did not require an expert to show its character or effect. The indictment alleged the gun shot wound, which resulted in death and the evidence completely supported the allegation.

The charge of the Judge was "to find the defendant guilty as charged in the indictment, or acquit" and by their verdict, the jury found him guilty as charged in the indictment. It does not make out a case of variance if, in addition to the proof that is necessary to sustain the indictment, the prosecution goes farther and shows other wounds which were administered by the defendant to the deceased.

> "State vs. Fox. 25 N. J. L. 566. Opin. 601. For the substance of the matter is that the party inflicted a mortal wound whereof the deceased died."

The non-expert witnesses testified with regard to the gun shot wound through the head, and the defendant, New, himself, testified that he shot the deceased first and then struck him over the head with the rifle, his testimony on this point being as follows:

"Q. Did you go into the room?
A. I did.
Q. What did you do?
A. I shot him.
Q. What was he doing?

A. He was sitting on the floor behind the door. When I opened the door I saw him there behind the door.

Q. What did you do?

A. I saw him there behind the door when I opened the door and shot him as quick as I could.

Q. What was he doing?

A. Still working at his left breast.

Q. What did you do after you shot him?

A. Struck him with the gun.

Q. Where?

A. In the head.

Q. Did you do anything after that?

A. I turned and walked out."

According to the theory of the plaintiff in error, the Territory should have only introduced evidence to prove the infliction of the gun shot wound and that when in addition to the gun shot wound the infliction of another wound, which of itself would have been fatal had not the gun shot wound been inflicted, was put in evidence, that a case of variance arose. Such a contention is wholly untenable. It was entirely proper, in fact necessary, to show the entire transaction and all of the wounds inflicted by New on Doyle and the Territory saw fit in framing the indictment against New to select whichever one of these wounds it deemed the fatal wound, or a fatal wound, and then the case was submitted to the jury upon the proposition as to whether or not the evidence sustained the allegation in the indictment beyond a reasonable doubt.

As before stated, they were instructed that they must either find the defendant guilty as charged or acquit.

The instructions were plain and unambiguous and the jury found that the gun shot wound was the cause of the death of Doyle.

This is in perfect harmony with the evidence, for the defendant, New himself, admits that he shot him first and then crushed in his head afterwards. That the gun shot wound was necessarily fatal. That after inflicting this fatal wound upon the person of the deceased that New saw fit to further mutilate his body by crushing his head with his rifle, is no ground to claim that there is any variance between the allegations and the proof.

The instruction asked for by defendant below was very misleading in its character when applied to the evidence, and was properly refused.

The second assignment of error is as follows:

"The trial court erred in failing and refusing to instruct the jury as to the law of manslaughter, and in failing and refusing to instruct the jury that the defendant might, under the indictment, be acquitted of murder and convicted of manslaughter, the issue of manslaughter being presented by the evidence at the trial, and prejudicial error and injury to the defendant's legal and substantial rights being committed by said trial court in ignoring and failing and refusing to present and submit to the jury said issue of manslaughter."

As to this complaint of the plaintiff in error, the first proposition to which I direct the attention of this court is the fact that the defendant below made no request of the trial court to give the jury such an instruction as that indicated.

The court will observe that the general charge given by the trial judge fully covered the offense charged in the indictment and that the defendant did request numerous special instructions on the trial of said cause, but did not in any manner or form, request the trial judge to instruct the jury that the offense of manslaughter was included in the charge of murder or that under the evidence in the case they might convict the defendant of manslaughter in either degree.

I contend that having failed to request the trial court to give an instruction, such as indicated in the assignment of error referred to, that the defendant thereby waived all right to the same.

He was represented at the trial by able and learned counsel, who contested every point in the case. It was his privilege under the law of the Territory to request the trial Judge to give any special instructions which he desired, and I believe that it was his duty to do so and that when he had requested other special instructions and failed to request an instruction upon the issue of manslaughter that he thereby waived the right to have such an instruction given, unless it was the absolute duty of the court, under the law of the Territory of Oklahoma, to have given such an instruction without being requested to by the defendant.

This brings us to a consideration of the proposition as to whether or not it is necessary in all cases of trial for homicide to instruct the jury not only upon the question of murder, but also upon

the question of manslaughter, whether the evidence does or does not tend to prove either of the degrees of manslaughter.

If it was the duty of the trial court to instruct the jury that the offense of manslaughter in the first and second degrees was included in the charge of murder, when there was no evidence at the trial which tended to prove either of the degrees of manslaughter, or which would have authorized the jury to find the defendant guilty of either of the degrees of manslaughter, then the trial court erred in not giving such an instruction.

But on the other hand, if it is the duty of the trial court to make the instructions conformable to the evidence and to only instruct the jury as to the law relative to those offenses which the evidence tends to prove, then it was not the duty of of the court in this case to instruct the jury that the offenses of manslaughter in the first and second degree were included in the charge of murder.

I contend that the law is definitely settled that where the evidence tends to prove only the higher and does not tend to prove the lower offense, that it is not necessary for the court to give an instruction to the effect that the defendant may be found guilty of the lower offense.

On the other hand, I concede that the law is just as well settled that where the evidence does tend to prove the lower offense, it is the duty of the court, when requested, to charge the jury as to the law of the lower offense which the evidence tends to prove.

It became the duty of the court, as a matter of law, to determine which one of these two rules was applicable in the trial of this case.

In support of my proposition that the court must determine as a matter of law what offense or offenses the evidence tends to prove, I submit the following authorities:

"But it is not necessary to instruct as to the lower degrees or offenses where there is nothing in the evidence tending to show the defendant to be guilty of such lower degree or offense and not guilty of a higher degree or offense charged."

1 McClain, Crim. Law. Par 391.

"Crime in Degrees.—If there are different degrees of an offense, the law should be given of each degree which the evidence tends to prove; otherwise, of any degree which it does not."

1 Bishop, New Crim. Procedure. Par. 980.

"The charge to the jury.—Should follow the rules stated in the first volume. Thus it should accurately give the law of whatever degree of the offense the evidence tends to prove, but not of the other degrees."

2 Bishop's New Crim. Procedure, Par 638.

I contend that before a court would be authorized to submit the offense of manslaughter to the jury under an indictment for murder, that there must be some appreciable evidence relative to the issue of manslaughter. That the court must determine as a matter of law whether there is any such evidence and if there is not, then he should refuse to instruct the jury as to manslaughter. On the other hand, having determined that there is

some evidence relative to the issue of manslaughter, then the credibility and force of such evidence must be for the jury and cannot be a matter of law for the decision of the court.

162 U. S. Supreme Court Rep. Stevenson vs. United States. p. 315.

Indeed, I believe it to be the law that even should the court instruct the jury as to manslaughter, when the evidence did not warrant an instruction upon such an offense, and the charge in the indictment being murder, that it would be a reversible error, even though the jury convicted the defendant of the lower offense. In support of this contention I cite the case of the State vs. Punshon, found in 124 Mo. Supreme Court Rep., pages 448 to 459 inclusive, and I extract therefrom the following:

The fifth paragraph of the syllabus is as follows: "Manslaughter.—Instructions.—Reversible Error.—Where the evidence on a trial for murder shows conclusively that the accused is either guilty of murder in the first degree or innocent of any crime, an instruction on manslaughter is reversible error, if he be convicted of manslaughter."

I extract from the opinion of the court in this case the following: "Another contention is that the court erred in instructing the jury on manslaughter in the first degree. That there was no evidence whatever upon which to predicate such an instruction is admitted by the Attorney General in his printed brief, but he argues, that, of this, de-

fendant cannot complain, because, we presume, of his conviction of a less offense than that for which he was indicted and put upon his trial. We do not understand this to be the law. While by statute it is made the duty of the court to instruct upon every phase of the case warranted by the evidence, IT IS NOT ITS DUTY TO INSTRUCT UPON ANY GRADE OF OFFENSE NOT AUTHORIZED BY THE EVIDENCE, AND IT IS ERROR TO DO SO. State v. Allen, 116 Mo. 548; State v. Herrell, 97 Mo. 105; State v. Wilson, 88 Mo., 13; State v. Turlington, 102, Mo. 642. In State v. Starr, 38 Mo. 272, it is said: "It is the duty of the court to instruct the jury with reference to the testimony in the case, and where the evidence all tends to prove one offense, it is wrong to mislead the jury by giving it instructions in relation to a different one." The instruction only had a tendency to mislead the jury, which it is evident from the facts in this case, as disclosed by the record, it did do. "Defendant was either guilty of murder in the first degree or not guilty of any offense at all, and the instructions should have been confined to that offense."

Is not this authority analogous to the case at bar? The charge in the indictment is murder. The defendant, New, was placed upon his trial, all the evidence tended to sustain the charge of murder in the first degree, and nothing else. He was either guilty of this offense or nothing. The only defense which he offered upon the trial was justifiable homicide. He made no request of the court to instruct the jury as to the degrees of man-

slaughter. Now this being the case, if the court had voluntarily and of its own motion, instructed the jury as to the degrees of manslaughter and the defendant had been found guilty of one of them, would he not then have been in a position to have contended that the court erred in instructing as to the degrees of manslaughter and that he might have been acquitted of the offense had the court not so done?

In the case of the State v. Duncan, 116 Mo., 312 inclusive, this same principle is ably discussed by that court. The 18th paragraph of the syllabus is as follows: "Manslaughter: Self Defense: Where the defendant's theory is that he killed an officer while resisting an unlawful arrest, he is not entitled to an instruction on manslaughter, but only to one as to self defense."

I extract the following from the opinion of the court on page 312: "It is, however, insisted that instructions should have been given covering manslaughter in the third and fourth degrees. There is no sound basis for such instructions presented by this record and for these reasons: If the police officers were not endeavoring to arrest the defendant, were not acting in their official capacity as peace officers, then the defendant had the undoubted right to resist them and their unlawful assaults, just in the same manner and to the same extent as those of a private individual. The law throws around an officer its special protection only while engaged in the performance of some official duty,

not otherwise." State v. Clayton, 100 Mo. 521 and cases cited.

If then, the officer or officers were not honestly endeavoring to arrest the defendant, but were simply endeavoring to wreak their personal malice against him, then the instructions given on the theory of self defense were all that the defendant could of right demand. If, on the contrary, the defendant was only engaged in resisting a lawful arrest, there was in legal contemplation, no hot blood, none of the elements or conditions of manslaughter in the case; for in such circumstances, "passion is wickedness and resistance crime."

Under the laws of the Territory as defined by our Crimes Act, homicide is defined to be murder as follows: "First; when perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being. Second; when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. Third, when perpetrated without any design to effect death by a person engaged in the commission of a felony."

The indictment in this case was drawn under the first sub-division of the definition of murder as above given.

It is also provided by our statute as follows: "Homicide, committed with a design to effect death, is not the less murder because the perpetrator

was in a state of anger or voluntary intoxication at the time.

"A design to effect death, sufficient to constitute murder, may be formed instantly before doing the act by which it is carried into execution."

"A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed."

It is further provided by the statutes of Oklahoma Territory that homicide is manslaughter in the first degree in the following cases: "First, when perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor. Second, when perpetrated without a design to effect death and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide. Third, when perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed."

It is further provided by the statutes of Oklahoma Territory that homicide is excusable and justifiable in the following cases:

"Homicide is excusable in the following cases: First, when committed by accident and misfortune in lawfully correcting a child or servant, or in doing any other lawful act by lawful means with usual and ordinary caution and without any unlawful intent. Second, when committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, provided that no undue advantage

is taken, nor any dangerous weapon is used and that the killing is not done in a cruel or unusual manner.

"Homicide is justifiable when committed by public officers and those acting by their command, in their aid and assistance, either; First in obedidience to any judgment of a competent court; or, Second, when necessarily committed in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty, or; Third; when necessarily committed in re-taking felons who have been rescued or who have escaped, or when committed necessarily in arresting felons fleeing from justice.

"Homicide is also justifiable when committed by any person in either of the following cases: When resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling house in which such person is; or, Second, when committed in the lawful defense of such person, or of his or her husband or wife, parent, child, master, mistress or servant, when there is reasonable ground to apprehend the design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished; or Third, when necessarily committed in attempting, by lawful ways and means to apprehend any person for any felony committed; or in lawfully suppressing any riot; or in lawfully keeping and preserving the peace."

The defendant attempted in this case to justify the killing of Doyle under the provisions last above quoted, conferring upon a person the right to commit a homicide in the lawful defense of his person, and upon the theory that he believed that the deceased, Doyle, was about to kill him. The

evidence of the prosecution made out a case of murder beyond any reasonable doubt. The defendant offered no evidence which tended to reduce the degree of the crime from murder to manslaughter, but based his entire defense upon the claim of self defense.

By section 5515 of Procedure Criminal, Vol. 2 Wilson's Statutes of Oklahoma Territory, it is provided: "Upon a trial for murder, the commission of the homicide by the defendant being proven, the burden of proving circumstances of mitigation or that justify or excuse it devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

This statute does not relieve the Territory of the duty of proving the defendant guilty beyond a reasonable doubt, but it merely casts upon the defendant in a case, where he seeks to lower the degree of the offense charged, the burden of introducing sufficient evidence to raise a reasonable doubt as to the degree of the crime of which he may be guilty.

The various Acts quoted above are undoubtedly subjects upon which the Legislature of the Territory of Oklahoma may lawfully legislate, and these Acts have been been considered and construed by the Supreme Court of the Territory of Oklahoma and I contend that this construction is binding upon this court.

In the case of Gatliff v. The Territory of Ok-

lahoma, 2 Okla. 523-534 inclusive, our court said: "Objection is made to the instructions because the court did not instruct the jury that they might find the defendant guilty of an offense as low as that of a simple assault. While it is true that a defendant may be indicted for murder and found guilty of an assault and battery, yet it is unnecessary under an indictment for murder or for an assault with intent to kill, that the court should instruct the jury that the defendant may be found guilty of an assault and battery, much less of a simple assault. IF THE EVIDENCE TENDED TO SHOW that the defendant was guilty of an assault with intent to kill, or of assault with intent to do bodily harm, or was innocent as we must presume in the absence of the evidence and on the record before us, that it did, it would be improper for the court to instruct the jury that the defendant might be found guilty of some lesser offense and one of which the evidence did not tend to prove him guilty.

"IT IS UNNECESSARY FOR THE COURT TO GIVE AN INSTRUCTION THAT THE DEFENDANT MAY BE FOUND GUILTY OF A LOWER OFFENSE, WHERE THE EVIDENCE TENDS TO PROVE ONLY THE GREATER."

In the case of Lawson v. Territory of Oklahoma, 8th Oklahoma pages 1 to 11 inclusive, our court laid down the doctrine just as forcibly, that in a case where the evidence did tend to prove the defendant guilty of a lower degree of crime than that charged, that it was the duty of the court to instruct the jury upon such lower offense and in

this latter case, on page 9 of the opinion, is found the following language: "If any evidence is introduced which tends to reduce the killing to manslaughter, it is a matter for the jury to determine whether it is murder or manslaughter, and not for the court."

Thus our own Supreme Court has laid down the rule under the laws of our jurisdiction, first, that where the evidence tends to prove only the higher, and does not tend to prove the lower offense, it is not necessary for the court to give an instruction to the effect that the defendant may be found guilty of a lower offense than the one charged, and on the other hand, that where the evidence does tend to prove the lower offense, it is the duty of the court, when requested, to charge the jury as to the law of the lower offense, which the evidence tends to prove.

In the opinion of the Supreme Court of Oklahoma in the case at bar, the court says: "The question is squarely raised here whether it is necessary in all cases of trial for homicide, to instruct the jury not only upon the question of murder, but also upon the question of manslaughter, whether the evidence does or does not tend to prove either of the degrees of manslaughter." The court then quotes the rule as laid down above, citing the cases of Gatliff vs. the Territory and Lawson vs. the Territory, and then say: "The only question then, is to determine which one of these two rules applies in this case. IT IS THE PROVINCE OF THE COURT TO DETERMINE WHETHER THERE IS OR IS NOT ANY

EVIDENCE WHICH TENDS TO PROVE THE LOWER DEGREE OF CRIME and when the court has determined that there is some evidence tending to prove the lower degree, then it is the duty of the court to instruct the jury IF REQUESTED, upon such lower degree. To apply the rule, we must consider the defendant's testimony, as upon this alone can there be any claim to manslaughter."

The court then proceed to give an analysis of the evidence of the defendant and to see if, from the testimony of the defendant himself, giving it the most favorable light to him, there is any evidence which tended to reduce the offense charged from murder to manslaughter.

After giving the evidence, the court then said, "The above includes the entire evidence of the defendant covering the period of the difficulty. Where in it can we find anything that tends to reduce the crime to manslaughter? The first of the three definitions of manslaughter in the first degree, as laid down in the statute, is where the homicide is "perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor". This paragraph cannot apply, because the defendant was not engaged in the commission of a misdemeanor, and it cannot possibly be said that there was no design to effect death."

The second paragraph of the law of manslaughter in the first degree is where the homicide is "perpetrated without a design to effect death, and in the heat of passion, but in a cruel and unu-

sual manner, or by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide." Neither can this provision apply, because it cannot be said that the homicide was committed without a design to effect death.

The third paragraph of the section defining manslaughter in the first degree, is where the homicide is "perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed." This is the provision of the law which the plaintiff in error claims applies in this case and the one which it is claimed the court failed to cover by proper instructions.

It will be noticed that the only testimony which it is claimed has a bearing on this subject and makes this provision of the law of manslaughter applicable, is that of the defendant himself, that when he looked up and saw the deceased forty or fifty yards distant, he was in the act of putting his hand inside his clothing in a manner which made the defendant think he was attempting to draw a revolver. Now, if the act of the deceased was sufficient to justify the defendant in this belief, in other words, if the act of the deceased was such as to make a reasonable man believe that he was in imminent danger of his life or great bodily harm, then there was sufficient justification for the defendant's act. But where is the element of unnecessary shooting? That is the principal element of the third subdivision of the law of man-

slaughter in the first degree. That is, the homicide must have been perpetrated unnecessarily, and, of course the homicide must have been perpetrated not only unnecessarily, but without premeditation or design. Where the evidence of the prosecution shows the killing to have been murder and the evidence of the defendant tends to show the killing to have been justifiable, it is only necessary that the instructions of the court should cover the law of the case as shown by the evidence.

State v. Hendricks, Kans. 4 Pac. 1050; People v. Lee Cam, Cal., 11 Pac. 183; Territory v. Baker, N. M., 13 Pac. 30; State v. Reed, 117 Mo. 604; State v. Fairlamb, 121 Mo. 138; State v. Kilgore, 70 Mo. 546.

If the theory of the defendent was sustained by his evidence, then the firing of the shot was justifiable, and even had the death of the deceased resulted from this first shot, there would have been nothing to introduce the element of manslaughter into the case, but let us observe the further conduct of the defendant, not only for the purpose of finding if there is anything which would have introduced the element of manslaughter into the case, but if it does not absolutely repel the thought that the defendant could have been guilty of either of the degrees of manslaughter, and that he was either guilty of murder as charged or nothing.

As said by our court in its opinion, "Even if the acts of the defendant at the beginning of the shooting, separated from the latter part of the difficulty, would have been deemed justifiable, yet his

following upon the deceased, his deliberate shooting by laying his Winchester rifle upon a fence post and his continued following up and continued shooting at the deceased, after he was wounded and while he was fleeing, and the vicious manner in which he spoke to Trotter when Trotter tried to persuade him to desist the pursuing of deceased into the inner room of the house, to which he had fled for safety, and the deliberate manner in which he entered the room and shot the deceased, all show a viciousness of mind for which there is no excuse whatever and which must have impressed the court and the jury with the fact of the premeditated design of the defendant to kill the deceased, and which cannot be held to show that the homicide was perpetrated unnecessarily, either while resisting an attempt by the person killed to commit a crime or after such attempt had failed."

I desire to call the attention of the court especially to the testimony of this defendant himself, as found on pages 83, 84 and 85 of the printed transcript and record, from which I will extract the following statements made by the defendant: "I saw a steer out in the road that I thought was mine. I had some that had been getting out. I had some boys working on the fence. They had told me that they had not quite got it finished. Austin had. He was working for me at that time. I went down and it was my steer, and I got through the fence and laid my gun down. When I got through the fence I run him back right by the gate, it was a wire gate and he galloped in. The bottom wire being

slack he galloped in. I tacked up the wire. There was some staples out of the post that held the wire up when I got there. I taken the piece of wire off the post and went back to the gate. But before I got back I saw Doyle and Reaves coming,—I supposed it was. I knew them and supposed it was them. I saw Doyle running around the horses that was loose. I thought they was going into Lightfoot's house. He got out and headed them and gave them a scare and they came trotting down the road, and he taken the lines and came driving down. I started on down and they was at that time as much as fifty yards this side of Ben Lightfoot's place, fifty yards closer than when I first saw them. I went down and began to work at the fence and I looked up and saw that it was Reeves and Doyle coming. I kept on working and looked up the second time. At that time they was in about forty or fifty yards. I saw Doyle reach in his bosom like that (indicating in his own bosom). He began to jerk out something, I supposed a pistol. I just reached and picked up the Winchester and fired. * * * * *

Q. What made you fire the first shot?

A. I was afraid he would kill me.

Q. What made you afraid? Why was you afraid?

A. He had threatened to do so and he reached into his bosom and I was afraid he would kill me.

Q. Tell what happened.

A. I shot the first shot and him and Reeves jumped out on the opposite side. I could only see their heads and shot the second time. I had kept right with the wagen until they passed and then the team had run by and they was in plain view and I shot two or three times more.

Q. What was Doyle doing when in plain view?

A. Working at his breast trying to get his pistol out.

Q. What did Reeves do?

A. He turned and ran back west. I do not know what he did. I saw him pass him going back west. I never looked to see.

Q. You say that after the team passed that you saw Doyle holding his hand there at his breast and you shot twice more?

A. Yes sir, I quit shooting when he was something like one hundred yards from me, I quit shooting. I ceased firing and he checked up and turned and looked back and commenced working at his breast again like he was trying to get his pistol out.

Q. What did you do then?

A. I laid the gun on a post and shot him.

Q. What did he do?

A. He ran and kept running.

Q. Did you know whether you hit him that shot or not?

A. I thought I did. He throwed his hand on his leg and I thought I had hit him.

Q. What did you do?

A. I followed him to the house.

Q. What made you follow him?

A. I was afraid he would turn and shoot me.

Q. Was you out of shooting distance?

A. No sir.

Q. How far away was you?

A. About one hundred yards.

Q. You heard the testimony of Mrs. Trotter about what occurred at the door; that you promised her not to go in. If you made such a promise, tell why you made it.

A. I did. 2. Because I was afraid he would shoot through the door or out of the door and kill me while they was holding me.

Q. Did you go in the room?

A. I did.

Q. What did you do?

A. I shot him.

Q. What was he doing?

A. He was sitting on the floor behind the door. When I opened the door I saw him there behind the door.

Q. What did you do?

A. I saw him there behind the door, when I opened the door, and I shot him as quick as I could.

Q. What was he doing?
A. Still working at his left breast.

Q. What did you do after you shot him?
A. Struck him with the gun.

Q. Where?
A. In the head.

Q. Did you do anything after that?
A. I turned and walked out."

According to the evidence of the defendant himself, leaving out the conclusive testimony of the Territory, he was guilty of a most atrocious murder, even if he was justified in firing the first shot, and which it would be preposterous to contend that he was, under the circumstances, even as testified to by himself. His own evidence shows that his mind was full of hatred and malice for Doyle and that he embraced the opportunity to take his life. Even if he believed himself to be in danger when he fired the first shot, that danger immediately passed when Doyle and Reeves jumped out of the wagon and Reeves ran to make his escape and Doyle was endeavoring to control his frightened horses, but New continued shooting at him, hitting one of the horses, from which wound it dropped dead after it had gotten away from Doyle and he continued shooting at Doyle as he started to run to the house of Trotter, his neighbor, until Doyle was about one hundred yards distant from him, when Doyle checked his speed and looked back, at which New deliberately rested his

gun on the fence post and shot him, the ball piercing his thigh. Again Doyle started to run, but New, not yet satisfied, seeing that his victim is not yet dead, pursues him. Doyle reaches the house of Mr. and Mrs. Trotter and implores them not to permit New to take his life. They permitted him to enter the house and go into an inner room and then Mr. and Mrs. Trotter attempted to intercept New when he reached them, in hot pursuit of Doyle. New thrusts Trotter from him, telling him to turn him loose. Mrs. Trotter clings to New in a frantic endeavor to hold him and pleads with him not to murder Doyle in her house. He promises her that he will not, upon which she releases him. He then disregards his promise, enters the house, penetrates to the room where Doyle is hiding and finds him sitting on the floor behind the door. Notwithstanding his helpless condition, New then places his Winchester rifle to Doyle's head and shoots him through the head, inflicting a fatal wound. Not content with this, he clubs his rifle and crushes the skull of Doyle, although already suffering from a fatal wound.

Where in all the record of this case, is any fact or circumstance to remove it from the charge of murder? Even if New had some slight justification for firing the first shot, he has placed himself beyond all claim of justification or of a lesser degree of crime than murder, by his willful and malicious pursuit of Doyle,as he sought to escape from him and then by his deliberate slaying of

Doyle, after he had attempted to seclude himself in a place of refuge.

I will not attempt to embrace in this brief the testimony of Mr. and Mrs. Trotter, but I especially call the attention of the court to their evidence, found on pages 36 to 49 of the printed record.

The testimony of the witness, W. H. Reeves, found on pages 51 to 58 of the printed record, completely does away with the testimony of New that he had any reason to anticipate an attack from Doyle in the first instance, and Reeves was the person who was riding with Doyle in the wagon. I will not attempt to quote his testimony and merely call the attention of the court to the same, as in this discussion and for the purpose of determining this proposition, I have largely dealt with the question from the standpoint of the defendant's own testimony.

Referring again to the proposition that the defendant did not request an instruction upon the subject of manslaughter, I will say that this is a question of criminal procedure and practice in this Territory, and that under our law it was the duty of the defendant, if he desired such an instruction, to have requested it.

In the decision of the case at bar, the Supreme Court of Oklahoma, in its opinion, used the following language: "We think the plaintiff in error has not properly raised this question. If the defendant was entitled to instructions upon this

point, he should have asked the court below to instruct the jury upon the law of manslaughter and in the absence of such a request it was not error for the court to omit to give such instructions.

It is true that the court should instruct the jury upon all questions involved in a case, but when the court has covered the case with general instructions, it is not error to omit to instruct upon some particular branch of the case, deemed advisable by the defendant under his theory of the case; when the defendant has not asked for such instructions." Citing in support of their position, Lovett v State, 30 Fla. 102; Kelley v. People, Col. 39 Pac. 805; State v. Estepp, Kans. 24 Pac. 986; State v. Hendricks, 4 Pac. 1050.

This being a rule of practice established under our criminal procedure in our jurisdiction, I contend that it is also binding upon this court in the determination of this case, and that by reason of the failure of the defendant to request the instruction referred to, that he waived it and is precluded thereby.

I contend that there is no Federal question involved in this case. None of the constitutional rights of the plaintiff in error have been invaded and the questions upon which he asks the decision of this court on error, are those which are governed by statutory laws defining crimes, fixing the punishment therefor and prescribing methods of procedure for the trial of cases arising under the Crimes Act of the Territory of Oklahoma. That

inasmuch as these questions have all been passed upon by the Supreme Court of the Territory of Oklahoma, that unless their decision upon some of the questions involved violates some constitutional right of the plaintiff in error, that the adjudications of the Supreme Court of the Territory of Oklahoma are binding upon this court.

As said by this court in Cargill Co. v. Minn. 180 U. S. 466, "The questions just stated are questions of local law and in determining whether the statute violates any right secured by the Federal Constitution, we must in the particulars named, accept the interpretation put upon it by the State court."

In Tullis v. Lake Erie and Western Railroad, 175 U. S. 348-355, the question was as to the constitutionality of a statute relating to railroads and other corporations, except municipal corporations. The Supreme court of that state held that the statute was capable of severance and that its provisions as to railroads were not so connected in substance with the provisions relating to other corporations that their validity could not be separately determined.

This court followed that view, declaring it to be an elementary rule that it should adopt "the interpretation of a statute of a state affixed to it by the court of last resort thereof" (See authorities cited in support thereof).

In the case of Yazoo and Mississippi Valley Railroad Company v. Adams, 181, U. S., 583, this court said: "Assuming that we may exercise an

independent judgment respecting their construction, the examination we have given them leaves us in great doubt whether the argument that the taxes had accrued prior to the consolidation, is a sound one. The right asserted depends upon a comparison and construction of such statutes; AND THE SETTLED RULE OF THIS COURT IS THAT EVEN in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the state statute which has been adopted by the court of last resort in that state. Burgess v. Seligman, 107 U. S. 20; Flash v. Conn, 109, U. S. 371-379: Clark v. Bever, 139 U. S., 96; Board of Liquidation v. La., 179. U. S., 622."

The same proposition was enunciated by this court in the case of Fallbrook Irrigation District v. Bradley, 164 U. S. and I take it to be the settled law with regard to the construction which this court will place upon the decisions of the court of last resort of any state or territory. It may be urged that there is a difference between a state and a territory in view of the fact that the state is a local sovereignty while the territory is not, but I take it that while a territorial form of government is not sovereign in the sense that a state is, yet an Organic Act having been granted to Oklahoma Territory by Congress, and the Legislature having been authorized to legislate upon all rightful subjects of legislation not in conflict with the Organic Act and the Constitution of the United States or matters reserved by Congress, that to the

extent indicated the acts of the Territorial Legislature and the decisions of its courts of last resort are entitled to the same construction as the acts and decisions of a state Legislature or court.

The third assignment of error is as follows: "The court erred in the 19th section of the instructions to the jury in charging the jury as follows: "The jury are instructed that if from all the evidence, facts and circumstances in evidence in the case, you believe beyond a reasonable doubt that the defendant New could have withdrawn from the scene of the tragedy with safety and could have gone away from the scene of action with safety to his life and person and without committing the homicide described in the evidence, as a matter of law it was his duty to have done so and if he did not and you further believe from the evidence beyond a reasonable doubt that the homicide was not necessary in a reasonable and necessary defense of the life or person or habitation of said New at the time of the said homicide, then your verdict should be guilty of murder."

The plaintiff in error claims that this instruction is erroneous in that it placed upon the defendant the duty, when frightened and approached in a threatening manner upon his own premises, to retreat at the approach of his adversary, and that it deprived the defendant of the right of acting upon the reasonable appearances of danger, viewed from his standpoint, and weighed his actions by the actual danger he was then laboring under "from all the evidence, facts and circumstances in evidence" before the jury.

In the first place; counsel, for plaintiff in error proceed upon a mistaken assumption as to the meaning of this instruction and next they violate that elementary rule of construction which is that the jury was not at liberty to single out an isolated instruction and act upon it, but that all of the instructions of the court are to be taken and construed together, and so viewed in arriving at a determination.

This instruction, standing singly and alone, is not subject to the objection urged against it by the plaintiff in error, but taken in connection with the other instructions given by the court, they are so eminently fair as to warrant no complaint of any kind or character on the part of the plaintiff in error.

For the purpose of pointing out to this court specifically the other instructions which should be considered in connection with this, I call your attention to Instruction No. 1, asked by the Territory, on page 99 of the printed record which reads as follows:

"The detendant seeks to justify or excuse the killing on the ground of threats made by Doyle, to take his life and on the ground of self defense. Now, threats by Doyle to kill New do not afford a justification for New killing Doyle, unless it be shown by the evidence that at the time of the killing Doyle by some act then done, manifested an intention to kill New or do him some great bodily harm. If the defendant at the time of the killing had a reasonable apprehension that it was the intention of Doyle to make an immediate assault on

him and take his life or do him some great bodily harm, he had the right to defend himself and it would make no difference whether the danger was real or imaginary, so that it had the appearance of being real, and in determining the question of apparent danger, you should look at the facts from the defendant's standpoint. But in order for New to justify himself on this ground, you must believe from the evidence that the circumstances surrounding the parties was such as to create, and did create in the mind of New a bona fide apprehension on the part of New that it was the intention of Doyle to make an immediate assault on him, the defendant, and take his life or do him some great bodily harm and if you believe that the said Doyle, by some act done, or words spoken at the time of the killing, created in the mind of New a just and reasonable apprehension of death or serious bodily injury, and that the said New shot and killed the said Doyle to defend himself from such danger, if any there existed, then you will find the defendant not guilty. The defendant New had no right to kill Doyle under the apprehension that Doyle might kill him at some future time, and if you find that was the motive that induced New to kill Doyle then he could not justify the killing on the ground of self defense."

Also to instruction No. 3, asked by the Territory; on page 100, which reads as follows:

"Every person is permitted by law to defend himself against any unlawful attack, reasonably threatening injury to his person and is justified in using all necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary."

Nothing could be more fair than the above

instructions, and they completely do away with any objections which could be urged against the 19th instruction complained of by the plaintiff in error, but if the instructions asked by the Territory were not sufficiently favorable to the defendant, they were certainly covered by the special instructions given by the court at the request of defendant and to which I call the attention of this court as follows:

The first instruction given by the court at the request of the defendant, on page 101 printed record, reads as follows:

"The jury are instructed as a matter of law that if a person believes, and has a reasonable cause to believe that another has sought him out for the purpose of killing him, or of doing him great bodily harm, and that he is prepared therefor, with deadly weapons, and the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat, but he has the right to stand and defend himself, and pursue his adversary, (if necessary) until he has secured himself from danger, and if in so doing, it is necessary, or it appears on reasonable grounds to be necessary to kill his antagonist, the killing is excusable on the ground of self defense."

The interlineation "if necessary" was added by the court, to which the defendant excepted.

Instruction No. 2, requested by defendant, page 101, record, reads as follows: "In this case the defendant pleads that in taking the life of the deceased, Doyle, he acted upon reasonable appear-

ances of danger, of being killed by the deceased, or of receiving serious bodily harm at the hands of the deceased. In passing upon this defense it is your duty to view the facts and circumstances occurring at the time of the killing from the defendant's standpoint, as they then reasonably appeared to him."

Defendant's request, Instruction No. 4, page 102, record, reads as follows: "To excuse himself in this case, upon the ground of self defense, it is not necessary that the defendant should have been in actual danger of losing his life, or of having serious bodily injury inflicted upon him by the deceased. It is sufficient in law to justify the defendant in taking the life of the deceased if at the time of the homicide it then reasonably appeared to the defendant from the acts of the deceased, considered in connection with the previous threats of the deceased, if any such threats appear from the evidence to have been made, that it was then the intention of the deceased to kill the defendant, or to inflict serious bodily injury upon him, and, if you so find from the evidence or, if from the evidence you entertain a reasonable doubt as to whether the defendant actually believed he was in danger and such belief was based upon reasonable evidence of danger, and made the fatal assault while acting under such belief, you will acquit the defendant, although as a matter of fact the defendant was in no actual danger at the hands of the deceased at the time of the killing, (provided you further believe from the evidence that the defend-

ant believed such killing was necessary for such defense.")

This instruction was modified, by the interlineation shown in the brackets, to which the defendant excepted.

It seems to me that a mere reading of these instructions takes away all grounds of argument of the plaintiff in error, based upon Instruction No. 19. In their assignment of error they say as above quoted that it deprived the defendant of his right to act upon the reasonable appearance of danger viewed from his standpoint at the time, and yet, as was just shown by the court, the jury were specifically instructed at the request of the defendant, that the defendant had the right to act upon the appearance of danger as it looked to him at the time, and that the jury should look at the facts from the defendant's standpoint. They were also instructed in Instruction No. 1, given at the request of the defendant, that a person when unlawfully assaulted is not required to retreat, but has a right to stand and defend himself, etc., so that taking all of the instructions together they could not possibly have been mislead or have misunderstood Instruction No. 19. The court in examining Instruction No. 19 will observe that the first half of the Instruction is qualified by the latter half, but even taking Instruction No. 19 alone, still it does not conflict with the rules of law applicable to this case.

The plaintiff in error seems to rely mainly upon the authority of the case of Beard v. United

States, 158, U. S. pages 550 to 564 and the doctrine announced by this court therein. I take no issue with the law announced by this court in that case and the mistake which counsel for plaintiff in error make is in saying that the facts in that case are analogous with this.

The syllabus in the Beard case reads as follows: "A man assailed on his own grounds without provocation, by a person armed with a deadly weapon. and apparently seeking his life, is not obliged to retreat but may stand his ground and defend himself with such means as are within his control; and so long as there is no intent on part to kill his antagonist, and no purpose of doing anything beyond what is necessary to save his own life, is not guilty of murder or manslaughter if death results to his antagonist from the blow given him under such circumstances."

In the Beard case there was an angry dispute between Beard and three brothers by the name of Jones over the right of one of the Jones boys to forcibly remove a cow from the premises of Beard on which the dispute occurred, they asserting the right to take the cow and he asserting his lawful right to retain it and in the progress of the dispute one of the Jones brothers advanced upon Beard in a threatening manner with his hand in the pocket of his trousers and when he got within five or six steps of Beard the latter warned him to stop but he did not do so. As he approached nearer to Beard he was asked by Beard what he intended to

do, to which he replied: "Damn you, I will show you," at the same time making a movement with his left hand as if to draw a pistol from his pocket, whereupon the accused struck him over the head with his gun and knocked him down.

In the case at bar no assault was made by Doyle upon New and at the most New only claimed that from certain motions that Doyle was making he believed that Doyle was about to draw a pistol and that without waiting a moment for further developments he drew his Winchester rifle and shot at Doyle.

The doctrine announded in the Beard case undoubtedly applies to a person who is assailed upon his own premises. I concede that when a person is in a place where he has a right to be and is without fault and has committed no overt act or done nothing to provoke an assault, that when he is assailed in a violent manner that he may stand his ground and repel force by force and if necessary for the actual or apparent preservation of his life, or to defend himself from great bodily injury, he thereby slays his assailant, he will be justified, but the facts in this case do not bring it within the operation of the rule just announced and the instructions given by the court were more favorable than the plaintiff in error was entitled to.

The doctrine announced in the Beard case has been adopted by the Supreme Court of the Territory of Oklahoma, as announced in their opinion in the case of Mahaffey v. the Territory, 11th Oklahoma, 231, 232.

I feel confident that when this court shall examine the instructions given by the trial court, in connection with Instruction No. 19, that from a review and comparison of all the instructions so given you will have no hesitancy in declaring that all the rights of the defendant were fully protected thereby.

The fourth assignment of error is to the effect that the trial court erred in instructing the jury, (No. 15½,) as follows: "The court instructs the jury that if a man kills another through mere cowardice; or under other circumstances, which are not, in the opinion of the jury, sufficient to induce a reasonable and well grounded belief of danger to life or great bodily harm in the mind of an ordinarily courageous man, the law will not justify the killing on the ground of self defense."

I do not believe that this assignment is entitled to serious consideration by this court. As stated by the Supreme Court of Oklahoma, in its opinion, it might be a question whether the instruction was necessary at all, under the evidence of the case, and was evidently given because of the statements of the defendant that he was afraid the deceased would kill him, and this instruction was given for the purpose of covering this branch of the case, so that the jury would not be misled in case they believed that the killing was done by reason of the cowardice of the defendant, or in other words, through fear that amounted to cowardice.

I believe, however, that it was proper to give

this instruction, in view of the declaration of the defendant that at the time he rested his rifle upon a post and shot Doyle in the thigh, at the time when Doyle had stopped about one hundred yards off, when he was running away from New, that New said he shot him because he was afraid that he, Doyle, might turn and shoot him, and again, because of his statement that when he shot Doyle in the house after he had pursued him to the inner room and found him sitting on the floor hiding behind the door, that he shot him because he was afraid that Doyle might shoot him.

If the statement of New was in fact true, it would be no defense and no excuse for his acts and would be such an exhibition of cowardice on his part as would not amount to a defense in law.

I take it that it needs no citation of authorities to this court to sustain the proposition, but that it has become elementary that if one person kills another through mere cowardice, he cannot justify himself for so doing, and the court was very careful in this instruction to tell the jury that if a man kills another through mere cowardice, or under circumstances, etc. not sufficient to induce a reasonable and well grounded belief of danger to life or of great bodily harm in the mind of an ordinarily courageous man; certainly this was the law and when the defendant was placed under the operation of those rules which would apply to the question of ordinary courage under similar circumstances, he was given all that he was entitled to under the law.

As the fifth assignment of error, it is alleged that the trial court erred in assuming as a fact that the deceased came to his death from the defendant. with a Winchester rifle, shooting a bullet into the body of the deceased, and in assuming as a fact that the said shooting and bullet was the cause of the death of the deceased, etc.

It is only necessary to call the attention of the court to the fact that the defendant admitted the killing and sought to justify himself on the ground of self defence, and that it was an undisputed and admitted fact throughout the trial of this case that Doyle was killed by New, that New testified to this fact himself when on the witness stand, and in this respect the same argument might be advanced as that made herein, opposing the claim of the plaintiff in error that there was a variance between the allegations and the proof.

The specific objection urged in this assignment seems to be to the expression used by the court in one of the instructions, wherein the court used the language. "at the same time the fatal shot was fired by the defendant," and the expression, "before the fatal shot was fired." It is claimed that this was an assumption by the court, an invasion of the province of the jury.

I cannot believe that where the killing was admitted and the fact undisputed that the fatal shot had been received by the deceased at the hands of the defendant, that the mere use of such an expression as this above quoted, is erroneous, and certainly if it was, it was harmless error under

the facts in this case and could not have been prejudicial in any manner to the defendant.

The sixth assignment is that the court committed error in refusing to give Instruction No. 1, requested by the defendant, but modified the same by inserting therein the words "if necessary." (See page 101, printed record) The propriety of inserting the expression "if necessary" in this instruction is so apparent that I do not feel that it needs any argument on my part to sustain the action of the trial Judge in so doing.

Returning briefly to the proposition that the instructions should be considered as a whole and not by singling out some particular instruction and attempting to construe it by itself, I call the attention of the court to the doctrine announced by the Supreme Court of Kansas in the case of the State v. Yarborough, 39 Kans. 588. In the opinion written by Chief Justice Horton, he says: "Instructions are to be considered and construed together as a whole and if not erroneous when so construed, no one of them will be held erroneous." (State v. Dickson, 6 Kans. 209; State v. Potter, 15 Kans. 302; State v. Rhea, 25th Kans. 576).

In their brief in the Supreme Court of Oklahoma, counsel for plaintiff in error lay much stress on the frailties of human nature and upon the doctrine that where one person kills another while acting under the influence of great excitement and terror induced by a sudden attack made upon such person by another who seeks to take his life or by a sudden passion caused by such assault, that a

killing by a defendant under such circumstances cannot be murder.

While it is true that the law, in its tender regard for the imperfections of human nature and for the protection of the person of one who may be unlawfully threatened with great danger to his life, has often permitted such facts and circumstances to be considered for the purpose of taking from the offence charged that element of malice aforethought and wickedness of heart which is supposed to accompany the perpetration of a murder, yet this doctrine is not applicable to the facts in this case.

The law carefully distinguishes between a sudden transport of passion which springs instantaneously, from what it allows as a sufficient provocation and which prompts to an immdiate act of violence, and a purpose of revenge, which usually follows such passion.

In the first case, in condescension to the frailty of our nature; the law allows the provocation to extenuate a homicide committed at the instant, from murder to manslaughter.

In the other, the provocation furnishing an incentive to revenge, so far from extenuating the crime, is a circumstance to be looked to as evidence of malice.

It must be borne in mind that the criminal law holds sane men responsible for the ordinary exercise of their reason; that although indulging to a certain extent mere infirmities of human nature, nevertheless it requires the exercise of control or

mastery over one's passion. The law does not allow a man to voluntarily strip himself of all those balancing instincts by which even the worst of us continues to walk with some degree of steadiness among temptations. (State vs. Yarborough, supra.)

Every sane man is supposed to contemplate and intend the usual and ordinary results of the acts done by him.

In this case there is no claim made that the defendant, New, was not a man of sound mind or of ordinary discretion. The evidence in the case shows that he was not on good terms with the deceased and that he had many reasons to harbor motives of revenge against the deceased. Even were his own testimony true he had no sufficient provocation for firing the first shot at the deceased. Even if he had that provocation, the justification passed long before the commission of the acts by which he inflicted the fatal wound upon the deceased. Taking his own evidence in connection with the other facts and circumstances of the case and instead of making out a case of justifiable homicide, it shows beyond peradventure that his mind was full of thoughts of revenge or fancied grievances against the deceased and that instead of honestly believing his life to be in danger at the time he fired the first shot, that he sought out and took advantage of the first opportunity or slightest pretext that presented itself that gave him an opportunity to take the life of the deceased.

Had he been actuated by honest fright when

he fired the first shot, he being a man of sound mind and ordinary intelligence, must have known that when Doyle began to flee from him and had reached a point one hundred yards away, that he (New) was out of danger, and why was it if he were actuated by fright, that even though, if justifiable in his acts he had a right to stand his grounds, that he did not endeavor to get away from Doyle, for with Doyle running in one direction, had he gone the other, certainly there was no danger. But he does not stop even here and after he has deliberately placed his gun upon a post and drawn steady aim at Doyle and shot him through the thigh, and after Doyle has sunk down upon the ground and raised up again and started to run toward the house of Trotter, removing himself as fast as possible from the proximity of New, why does New still pursue him and keep pursuing him, even to the inner room of the house of Mr. and Mrs. Trotter where, when he finds him hiding behind the door, trying to escape the vengeance of his blood thirsty pursurer, he then shoots him down without mercy and further mutilates his body by crushing in his skull.

Where in the history of this case can there be found any facts or circumstances which entitles the plaintiff in error, New, to plead the frailties of human nature and ask in his behalf the tender mercies of the law. The evidence all shows that New committed a brutal, cowardly and atrocious murder. That he formed a design to take the life of Doyle. Whether that design was one of long

standing or whether it was formed immediately before the commission of the homicide, is immaterial so far as this case is concerned, for under the law of our Territory, a design sufficient to constitute murder, may be formed instantly before the commission of the homicide.

The plaintiff in error had a fair and impartial trial by a jury of his fellow countrymen and to whose qualifications he makes no objections.

All the facts were carefully detailed, the rights of the defendant were conserved in every instance by the fair and impartial rulings of the court and by full instructions to the jury upon the law of the case

There is nothing in this case of which the plaintiff in error can complain or which entitles him to any other consideration from this or any other court than that sympathy which we naturally feel for every unfortunate human being who has allowed his evil nature to gain possession of him and overcome and over-ride whatever good instincts he may originally have had.

Those who commit heinous crimes must not expect to go unpunished and the plaintiff in error, New, in being condemned to pass the rest of his life in penal servitude, instead of complaining, has reason to be thankful that the jury before whom he was tried did not see fit to impose the death penalty upon him, as they would have been amply justified in doing under the evidence in this case.

All things considered, I contend that the re-

cord is without error, of which this court will be called upon to notice, and I therefore ask that the judgment of the Supreme Court of the Territory of Oklahoma be affirmed in all things.

Respectfully submitted;

P. C. SIMONS,

Attorney General of Oklahoma Territory, for Defendant in error.